No. 17642

In the

United States Court of Appeals

For the Ninth Circuit

MAURICE LIBERMAN, JOSEPH GREVEY and JACK GREVEY, co-partners, d.b.a. DUKE CITY LUMBER COMPANY, and DUKE CITY LUMBER COMPANY, a partnership,

Appellants,

vs.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT T. JENKINS and GEORGIA MAE JENKINS, general partners, and GEORGIA MAE JENKINS, Trustee for JAMES HENRY NAGEL, limited partner, d.b.a. NAGEL LUMBER & TIMBER COMPANY, a limited partnership, and NAGEL LUMBER & TIMBER COMPANY, a limited partnership,

Appellees.

Reply Brief for Appellants

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Appellants,

vs.

George H. Nagel, Mabel J. Nagel, Robert T. Jenkins and Georgia Mae Jenkins, general partners, and Georgia Mae Jenkins, Trustee for James Henry Nagel, limited partner, d.b.a. Nagel Lumber & Timber Company, a limited partnership, and Nagel Lumber & Timber Company, a limited partnership,

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INTRODUCTION

In appellees' brief a carefully selected transcript reference is cited here and there in a vain attempt to support the findings and conclusions of the District Court. Even their own citations do not support appellees' position. And in light of all the evidence the findings and judgment cannot stand.

Either appellees have not addressed themselves to appellants' arguments on the law, or they have failed to meet them.

This judgment must be reversed.

ARGUMENT

1. The Parties Did Not Intend to Affect Their Legal Relations in Winslow on September 20, 1958.*

(Br. 7, 8, 10-15; Appellees' Br. 3-8, 14, 16, 18-22).

It was understood when Maurice Liberman left Winslow on September 20, 1958, that purchasing the mill together would be a good idea. (Br. 5, 11, 47-48; Appellees' Br. 21). None of the terms of an agreement had been worked out. (Br. 11-12, 13-14; Appellees' Br. 23-24). Maurice Liberman was to return to Albuquerque to prepare the agreement. (Br. 5; R. 293, 335, 386-387, 393, 794-796, 882-883, 1548, 1571-1572, 1839, 1922). He prepared two letters. Appellees signed one, but not the other. (Br. 5, 30-32; Appellees' Br. 30). Appellees gave up their right of first refusal only after the first letter was signed. (R. 394-395). Until that letter was signed, no one intended to be bound. Appellees have not distinguished negotiations from legal obligations. Appellees cannot and do not controvert the legal principles of contract liability set forth in *Joseph v. Donover Co.*, 261 F.2d 812 (9th Cir. 1958). Those principles apply here. (Br. 6, 8, 10-15). The evidence will not support a finding that an enforceable agreement was made September 20, 1958.

2. There Was No Contract.

First, there was no meeting of the minds.† (Br. 7, 8, 15-28; Appellees' Br. 7-8, 16-17, 24-29).

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*The references in this brief to the printed record are thus: (R. 101); the references to the exhibits, thus: (Ex. A); the references to appellants' opening brief, thus: (Br. 10); the references to appellees' brief, thus: (Appellees' Br. 20).

†Appellees argue that appellants' version of the contract is not involved on this appeal. (Appellees' Br. 18). Whenever there is no meeting of the minds, each party will stand on his own interpretation. The District Court held that appellees did not agree to appellants' interpretation. The question whether the District Court disregarded the evidence and the law in doing so is open on appeal, as is the question whether there was a meeting of the minds.

Appellees in their brief finally perceive what has been implicit in their position since the filing of the amended complaint: An analysis based on a finding that any option was to have the duration specified in the September 23 letter agreement would be fatal to their case. (Appellees' Br. 24-27; Br. 15-28).

Appellees do not challenge appellants' contention that no one would ever grant or expect to receive an option open until cancelled by mutual consent to participate after purchase at the initial purchase terms. (Appellees' Br. 24-26; Ex. 3 (R. 1423)). To grant such an option would be beyond human understanding; to receive it, too good to be true. (Br. 15-17, 22, 26-27).

Appellees, therefore, continue to urge that they were party to an option expiring April 30, 1959, no later. They argue that there was a meeting of the minds because the District Court determined that both parties expressly assented to such an option. (Appellees' Br. 25). But this determination was clearly wrong. The court below could not properly find that the parties had assented to any option except an option with the duration provided in the September 23 letter agreement. The option in the letter agreement did not expire April 30, 1959. (Ex. 3 (R. 1423)). Appellees cannot and do not deny this. (Appellees' Br. 25).

Appellees cannot lawfully escape from the final paragraph of the letter agreement. The September 23 letter was the signed writing required by the Arizona statute of frauds. (Br. 18-20). Appellees cannot and do not deny that it was an integrated document. (Appellees' Br. 25-27, 29). They argue that appellants are estopped to rely on the statute. They say the parol evidence rule does not apply. (Appellees' Br. 25-28, 29).

Appellees' cases, however, do not stand for the proposition that the statute of frauds will allow a written contract for the sale of realty* to be disregarded once one of the parties has per-

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*Appellees repeatedly assert that only a negligible amount of real property was involved in this transaction. (Appellees' Br. 2, 35, 38-39). Simple addition of the sums listed in the footnote on page 2 of appellees' brief will confirm that approximately two-thirds of the purchase price was allocated to land and improvements, all of which is real property.

formed. Appellees' cases apply only when the cause of action is based on *no* written agreement. The very material they cite demonstrates that this is true. (Appellees' Br. 28-29). The statute may sometimes be disregarded, they say, "'[w]here one has acted to his detriment solely in reliance on an oral agreement * * *.'" (Appellees' Br. 28). That clearly is not this case.†

Appellees signed the writing required by the statute of frauds. The statute requires that they be bound by the writing signed. Yet appellees urge, and the District Court found, that they did not intend to agree with the duration of the option provided in the writing. If appellees' position is accepted and the finding of the District Court is true, appellees did not agree to the only option the statute of frauds would allow the District Court to find.

Nor have appellees answered appellants' argument that the parol evidence rule prevents a finding that the minds of the parties met on an April 30, 1959, termination date. At one point, they suggest that the parol evidence rule does not apply because the real agreement was made in Winslow. (Appellees' Br. 25). But an integrated document was admittedly signed in Albuquerque on September 23. (*Ibid.;* Ex. 3 (R. 1423)).

Elsewhere in their brief, appellees say that the District Court could vary the termination date provided in the letter because there are ambiguities in the letter, that is, ambiguities in other provisions.* (Appellees' Br. 26, 29). Termination date bears strongly on time of "participation," (Br. 15-17, 22, 26-27; *supra* p. 3), but it is not the same. Appellees cannot and do not contend that it is. Ambiguity in "participation" does not open the door to rewriting the balance of the letter. (Br. 20-21).

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†Appellees address themselves to an argument that the writing was insufficient to reflect any agreement reached. (Appellees' Br. 27-29). This argument is not in appellant's brief. Appellees fail to distinguish between an argument that the agreement is incomplete and an argument that the writing is incomplete.

*Appellees' reference, (Appellees' Br. 26), to an exchange between court and appellants' trial counsel to demonstrate that appellants have conceded an ambiguity in the final paragraph is inaccurate and misleading. See R. 233.

Finally, appellees have confusingly crossed out parts of the final paragraph of the letter, apparently in an attempt to demonstrate the existence of an ambiguity. (Appellees' Br. 25-26). The paragraph admittedly looks odd with fat black lines drawn through parts of it. But for all their efforts appellees have failed to demonstrate any ambiguity. Appellants do not argue that the letter agreement said that any option would be "open forever," only that this would be the effect of the termination provision as written. (Br. 15-17, 22, 26-27). Appellees cannot deny the latter.

Only if the final paragraph had been lopped off after the figure "1959" to read, "This option remains in force until April 30, 1959," would the finding of the District Court have been proper. As it is, parol evidence was used to vary and contradict an unambiguous term of the writing.* The District Court was influenced by an erroneous view of the law.

Appellees suggest that the District Court properly disregarded the parol evidence rule because Maurice Liberman drafted the September 23 letter. (Appellees' Br. 29). They assume a nonexistent ambiguity. (*Ibid.*).

> "Courts may not permit a party to strain the construction of the contract to establish an ambiguity merely to invoke the rule of resolution against the drafter." *Central Casualty Co. v. Neuman Transit Co.,* 203 F. Supp. 413, 414 (D. Wyo. 1962).

As for Cox's testimony that the option would not be automatically extended, (Appellees' Br. 26), the statute of frauds and the parol evidence rule prevent using it to vary and contradict the writing. In any case, it is inherently incredible. The testimony is contradicted by the plain terms of the writing and by every statement Maurice Liberman made on the subject. (Ex. 3 (R. 1423)); (R. 797-799, 832-833, 976, 1580-1582, 1726). And Cox is appellees' attorney of record. Robert Jenkins, Mrs.

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*Appellees, in an aside, (Appellees' Br. 29), suggest that appellants should have specified error on the admission of evidence. The parol evidence rule is not an exclusionary rule of evidence but a rule of substantive law. See Br. 20.

Nagel, and Maurice Liberman all stated that they understood the final paragraph of Exhibit 3 to provide the termination date of any option to which they were bound. (R. 394, 797-799, 832-833, 976, 1580-1582, 1726, 1854-1857, 1932-1934; Br. 15-28). Cox's testimony could not, then, be the basis for a finding that appellees understood and that appellants knew or had reason to know that appellees understood that any option granted would expire April 30, 1959.

Appellees have not even attempted to face up to *Bradley v. Industrial Comm'n.,* 51 Ariz. 291, 76 P.2d 745 (1938), and *History Co. v. Dougherty,* 3 Ariz. 387, 29 Pac. 649 (1892). (Br. 23).

Actually, appellees knew they were getting an option they could keep open forever. Any such option to participate after the initial purchase at the initial purchase terms was too good to be true. (Br. 23-28).

Second, any agreement made in Albuquerque was void for vagueness. (Br. 7, 8, 11-15, 28-30; Appellees' Br. 23-24, 29-30).

The evidence is undisputed that ownership and operation, and the sharing of costs, profits, and losses of the lumber mill, half of which appellees claim a right to buy, were never actually worked out. (R. 283-293, 330-338, 361-367, 383-384, 389-392, 436-439, 796-797, 844-845, 882-885, 897-898, 935-936, 1546-1547, 1843-1857, 1884-1888, 1916-1929; Br. 10-15, 28-30). Appellees do not deny this; they cannot. (Appellees' Br. 24; see the material quoted at Br. 11-12, 14, 29).

Appellees now place their reliance on implied terms. (Appellees' Br. 23-24, 29-30). In *Chafin v. Main Island Creek Coal Co.,* 85 W. Va. 459, 102 S.E. 291, 293 (1920) (Appellees' Br. 23), cited in appellees' brief, plaintiff claimed one-half the difference between the $27,200 sellers of land asked and the $25,000 for which he was able to get it for defendants. There were no details of ownership, operation, costs, profits, and losses to be implied there. In *Boyer v. Bowles,* 310 Mass. 134, 37 N.E. 2d 489 (1941) (Appellees' Br. 24), the parties had in fact operated a business together for a period of at least ten years. The "conduct of the parties" during this lengthy period allowed the Massachusetts court to imply the terms of their relationship. (310 Mass. 134, 37 N.E. 2d at 494). Appellees' cases are not to the point.

Moreover, here appellees themselves could not agree on what terms they would imply. Jenkins thought appellants would get all the profit from their own timber. (R. 1924; Br. 14). But this was not Mrs. Nagel's understanding, so she said. (R. 291-292, 1886).

Appellees concede that the details of ownership, operation, and the sharing of costs, profits, and losses were not expressly agreed upon. (Appellees' Br. 24). Actually, ownership, operation, and the sharing of costs, profits, and losses were not agreed upon at all. (Br. 10-15, 28-30). They cannot be implied. Yet appellees claim $429,883.40 for not being allowed to participate in ownership, operation, costs, profits, and losses of the Winslow mill. This is error.

Third, appellees did not accept appellants' entire offer. (Br. 7, 8, 30-32; Appellees' Br. 30).

The evidence is undisputed that appellees intended the right to buy appellants out in seven years' time to be part of any understanding the parties can be held to have reached. (R. 282-283, 329, 339-340, 383, 396-397, 446-447, 800-801, 1838-1839, 1850, 1856, 1921; Br. 30-32, 47-48). Appellees do not deny this. (Appellees' Br. 3, 30). Mrs. Nagel did not sign the September 24 letter. (Ex. H (R. 1756)). Appellees now argue that Mrs. Nagel should be allowed to accept part and reject part of appellants' offer because the entire offer did not correspond with what appellees allege were the terms of the understanding. But appellees rely on no finding of the District Court to support their argument. The District Court did not even have the September 24 letter in mind. (Br. 30-32). Nor could the missing finding be made. (See Ex. H (R. 1756)). It is impossible on reading the September 24 letter to see why appellees did not sign it. But they didn't. There was no acceptance.

3. The Award Was Grossly in Excess of the Value of One-Half the Mill Minus the Contract Price.

(Br. 7, 8, 32-36; Appellees' Br. 35-36, 38-39).

Appellees do not deny that the value of one-half the mill was in the neighborhood of $250,000. The price appellees would have had to pay to purchase a half interest under their alleged contract was $325,000. Thus, their contract price was $75,000 *more* than their own undisputed testimony of the value of the one-half interest. (Br. 54). Obviously the $429,883.40 awarded to appellees was much, much greater than the *minus* $75,000 which represents the difference between appellees' cost of performance and the value of one-half the mill. Only one question remains: Can the present value of the profits reasonably expected to be earned from ownership of one-half the mill be over half a million dollars more than the negative difference between appellees' cost of performance and the value of one-half the mill? In other words, can the present value of the anticipated profits to be derived from the subject property be vastly in excess of the present value of the property itself minus the contract price? The answer to this question is certainly "no," as we shall demonstrate.

4. The Present Value of Profits Reasonably Expected to Be Earned from Ownership of One-Half the Mill Cannot Be Substantially Greater Than the Excess, if Any, of the Market Value of the Property Over the Contract Price.

(Br. 7, 9, 36-41; Appellees' Br. 35-36).

The evidence is undisputed that $429,883.40 is much greater than the excess, if any there were, of the market value of one-half the mill ($250,000) over the contract price ($325,000). (R. 312, 319, 327, 333-335, 375-378, 430-435, 439-442, 966-967, 1091-1092, 1497, 1641, 1723-1725, 1828-1832, 1882, 1904-1908, 1913-1915, 1920); (Ex. C); (Br. 33, 34-36, 54). Appellees do not deny this. (Appellees' Br. 35-36). Neither did the court below. The District Court refused to make any finding concerning the market value of one-half the Winslow mill. Appellees do not deny this. They believe, as the District Court believed, that the benefit of a bargain to purchase something can properly be measured by estimating, projecting, and discounting net revenues without any regard for market value and without comparing market value and contract price. (Appellees' Br. 35-36).

It is this fallacious theory and a misplaced reliance upon one Arizona decision *(Martin v. La Fon)* which have led the District Court into awarding a judgment which was grossly excessive.

But computing the present value of the net revenues reasonably expected to be received from operating the mill, before adjusting for depreciation, is simply one method of computing the market value of the Winslow mill. If, as appellees argue, (Appellees' Br. 50), contract price is properly reflected in the adjustment for depreciation, the present value of future profits, that is, net revenues adjusted for depreciation, cannot exceed the difference between market value and contract price. If it does (and appellees acknowledge that in this case it does) there must be a difference between actual market value and computed market value (and appellees acknowledge that in this case there is). In any such case, there must be error in the computation. (Br. 36-41).

Appellees to the contrary, (Appellees' Br. 36), there is nothing "wholly illogical" about this. Short-term leases, life interests, future interests, and lumber mills, (R. 137-138), are all valued by projecting and discounting anticipated net revenues reasonably certain to be received. *Martin v. La Fon,* 55 Ariz. 196, 100 P.2d 182 (1940); (Br. 39-40). This is a recognized but risky method of valuing investment property. Wixon, Accountants' Handbook 18.3 (4th ed. 1957); (Br. 39).

The language appellees quote from *Martin v. La Fon,* 55 Ariz. 196, 100 P.2d 182, 184 (1940) (Appellees' Br. 36), supports appellants' logical argument. *Evidence* of profits is *evidence* of value.

Appellees concede that the award greatly exceeded the difference, if any, between contract price and market value. (Appellees' Br. 35-36). Appellants have demonstrated here and in their opening brief that any such award is clearly erroneous (Br. 36-41).

Moreover, appellees misstate their principal case. The Arizona court in *Martin v. La Fon* did not recognize that "a recovery of five times the purchase price for loss of profits would be proper." (Appellees' Br. 36). The case came up on appeal from the granting of a motion to strike allegations that profits would be earned. (55 Ariz. 196, 100 P.2d at 183).

As for any " 'real estate theory,' " (Appellees' Br. 38), appellants do not know whom appellees are quoting or what they mean. Benefit of bargain equals the difference between contract price and present value *no matter what is being purchased.* (Br. 32-34).

5. The District Court Failed to Take Into Account the Full Cost of Appellees' Performance.

(Br. 7, 9, 41-43; Appellees' Br. 49-51).

Appellants are aware and have acknowledged that there was an adjustment for depreciation in the computation on which the District Court purported to base its award. (Br. 41). The District Court awarded appellees $429,883.40 as profits it found they would have earned by owning one-half the Gallagher mill. Appellees have paid nothing. None of their money is tied up. The effect of the District Court's award will be that appellants will have paid $650,000 to net what the District Court found to be $429,883.40. Appellants are bearing the burden of an investment from which appellees are awarded profits. The District Court failed to consider this. (R. 155-156; Appellees' Br. 50-51).

6. Future Profits Were Not Bargained for.

(Br. 7, 9, 43-54; Appellees' Br. 34-35, 36-39).

Appellees recognize that special damages in excess of the difference between contract price and market value can be awarded only if bargained for. (Appellees' Br. 38-39). Once again, they cite the same carefully excerpted portion of Maurice Liberman's testimony to support the contention that he was bargaining for future profits. (Appellees' Br. 34). The full text of the interchange appears at pages 49 through 51 of appellants' opening brief. It will not support the finding that Maurice Liberman was bargaining with appellees for future operating profits. And appellees do not and cannot quote any statement they made to show that *they* were bargaining for future profits. This is essential. Appellees have not distinguished the cases cited by appellants. (*Compare* Br. 45-46, 52-53 *with* Appellees' Br. 38). Appellees were bargaining for the position in the forest represented by the Gallagher mill. (See the material quoted at Br. 47-48). A finding that future profits were bargained for was error.

Whatever appellees now say that position in the forest means, (Appellees' Br. 37), at the time they were bargaining for the position they knew what they meant. (Br. 47-51). The definition of position in appellees' brief is correct: " 'Position' is acquired by owning and *operating* a mill supplied by Forest Service timber." (Appellees' Br. 37). The question is, which mill? The material quoted from the transcript at pages 47 through 48 of appellants' opening brief demonstrates that appellees wanted the Gallagher mill after 1965, not to operate it, but to shut it down. They needed to do this to decrease competition for Government timber to keep *their own mill* operating:

> "Mrs. Nagel: Oh, I told him that we needed the timber after the Aztec was cut for *our* mill to make a paying operation." (R. 282-283) (Emphasis supplied.) (Br. 61; see material quoted Br. 47-48).

Appellees do not deny that Robert Jenkins included the value of the position in his best estimate that the entire Gallagher mill was worth $500,000. (Br. 54).

7. The District Court Erred in Computing Anticipated Profits. (Br. 7, 9-10, 54-62; Appellees' Br. 39-58).

First, profits projected from the milling of "Future Forest Service Timber" are speculative and hypothetical. (Br. 56-60; Appellees' Br. 52-55).

Appellees have filled out the portion of their brief dealing with the District Court's computation of damages with lengthy expository passages in which they review quantities of uncontroverted material. The District Court's complicated computation is correctly and succinctly summarized at pages 55 and 56 of appellants' opening brief. Appellees cannot and do not take exception to appellants' summary. Appellees must have been loath to come to grips with this Court's opinion in *Peters v. Lines,* 275 F.2d 919, 931 (9th Cir. 1960). Their reluctance to proceed is understandable, for, so far as future timber is concerned, *Peters v. Lines* is this case. (Br. 58-60).

This Court recently held in *Peters v. Lines* that timber not under contract must be disregarded in computing damages based on loss of anticipated profits *even though* a market is assured* and *even though* there is additional timber in the area which the parties contemplate will be acquired. (Br. 58-59). This holding is in conformity with lumber industry practice, including appellees' own practice. When appellees settled their accounts with the Government they computed depreciation only on the timber they had under firm contract. They disregarded any timber they might acquire in the future. (Br. 57-58).

Appellees state that, "There is the difference of night and day between the proof of future damages in *Peters* and in the instant case." (Appellees' Br. 54). They then proceed to skirmish with arguments appellants do not put forward.† What appellees cannot get round is that *Peters v. Lines* holds that timber not under

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*In *Peters v. Lines,* a market for a 91-month period was assured. Milling company and logging company had a requirements contract. (275 F.2d at 922; Br. 58-59). Not even appellees' economic consultant could do that well for them. (Appellees' Br. 41-42).

†(1) Appellants do not argue that the award resulted from a mathematical error. (Appellees' Br. 54).

(2) No "woods operation" is in issue here. (Appellees' Br. 54).

(3) No "truck earnings" are in issue here. (Appellees' Br. 54).

(4) Appellants do not argue from *Peters v. Lines* that Nagel's accountants' reports are incorrect. (Appellees' Br. 54).

(5) Appellants do not argue from *Peters v. Lines* that probability of some profit does not exist. (See p. 13, *infra.*). (Appellees' Br. 54).

contract cannot be used in a projection of future profits reasonably certain to be earned.

Dahl Kirkpatrick testified only that there was additional timber in the area which might or might not come onto the market between 1960 and 1973, depending upon future Forest Service policy, fire, and the activities of tree destroying pests. (R. 457-498). As in *Peters v. Lines,* there was additional timber in the area which the parties hoped to buy. (275 F.2d at 929, 931); (Appellees' Br. 55).

The Code of Federal Regulations requires that the Forest Service timber, if sold, be sold to the highest bidder. (36 C.F.R. §§ 221.8, 221.10). Kirkpatrick did not testify that the Winslow mill "could have acquired additional timber." (R. 461-498; Br. 58). But if he had, he could not have done so meaningfully. (36 C.F.R. §§ 221.8, 221.10). Any award based on testimony that the Winslow mill could, with *any* certainty, have acquired additional timber would be based on proposed unlawful conduct by the Forest Service. Any such award could not stand.*

What appellees, at least in their brief, (Appellees' Br. 39-40, 52-53, 58), ignore, is that they would still receive $142,649.15 on an anticipated profits theory if "Future Forest Service Timber" were eliminated from the stretched-out projection.† (Br. 60)

Second, it was error to project profits too far into the future. (Br. 60-61; Appellees' Br. 55-58).

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*Appellees argue that since 1942, with only one exception, every sale from the Chevalon working circle has gone to the two mills in Winslow. What they do not point out is that from 1942 through 1950 every sale went to *one* mill. Since 1950 every sale has gone to *two* mills (R. 264-267). In 1962 every sale may go to *three* mills. (R. 138-140, 1036; Br. 57-58). Moreover, any practice of bidding on every other sale, (Appellees' Br. 44), would never survive the timber depletion caused by the Aztec cut. (Br. 46-47).

†Even timber under firm contract is in large measure speculative and hypothetical. (Br. 57). See, *e.g., Russell & Pugh Lumber Co. v. United States,* 290 F.2d 938, 941-942 (Ct. Cl. 1961) (holding that 20% deficiency on a 100% government cruise was not a "major deficiency").

In *Palmer v. Connecticut Ry. & L. Co.*, 311 U.S. 544 (1941), and *Hawkinson v. Johnston*, 122 F.2d 724 (8th Cir.), *cert. denied*, 314 U.S. 694 (1941) (Br. 60-61; Appellees' Br. 55-58), the parties had a relationship for a fixed term. In each case, anticipated profits were awarded for less than the fixed term. Here appellants were interested in the mill for only seven years. After that period, appellees wanted it to shut it down (R. 282-283, 329, 339-340, 383, 396-397, 446-447, 800-801, 1838-1839, 1850, 1856, 1921; Br. 60-61). There was no agreement to operate the mill together, but if there had been, it would have been for a period of not more than seven years. (Br. 61). It was error to project anticipated profits over more than twice that period.

That the fifteen-year period selected by the District Court is excessive is demonstrated by the fact that the award is vastly in excess of any difference between the $325,000 appellees would have had to pay and the market value of one-half the mill. Under a proper projection the award would have equaled the difference, if any, between $325,000 and the market value of one-half the mill.

Third, it was error not to adjust milling profit per thousand board feet milled to reflect inevitable increases in fixed costs. (Br. 61-62; Appellees' Br. 51).

Appellees argue that the District Court properly failed to make any adjustment in its milling profit per thousand as annual production slipped from 30,000,000 to a little over 10,000,000 board feet annually over the fifteen-year projection. (Appellees' Br. 51). They cite some rebuttal testimony by Robert Jenkins to support the untenable position that fixed costs will not vary with the level of production. But what needs rebutting is appellees' consistent testimony that they needed the Gallagher mill to decrease competition for government timber after 1965 to make their own substantially identical mill a "paying operation." (R. 283; Br. 61-62). The profit squeeze caused by dwindling timber supplies and rising costs is what this case is all about. (R. 282-283, 329, 383, 396-398, 446-447, 800-801, 1838-1839, 1856, 1921; see material quoted at Br. 46-48).

CONCLUSION

The brief of appellees is inaccurate and misleading. Appellees have misstated the case and appellants' argument. (Appellees' Br. 3, 4, 15, 18, 25, 27, 29, 35, 49). For a correct statement of the case and of appellants' argument, see appellants' opening brief.

For the reasons here summarized and discussed more fully in appellants' opening brief, the judgment should be reversed and the case remanded either with directions to enter judgment for appellants or for new trial.

Dated: June 27, 1962.

Respectfully submitted,

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CERTIFICATE OF CONFORMANCE

I hereby certify that I have examined the provisions of Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief conforms with the requirements of said Rules.

Burnham Enersen